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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

1984-85 TERM

ZBIGNIEW W. DYBCZAK,

PETITIONER-PLAINTIFF

VS.

TUSKEGEE INSTITUTE,
an Alabama Corporation,

RESPONDENT-DEFENDANT

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION OF ZBIGNIEW W. DYBCZAK FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER A PRESENT WHITE EMPLOYEE IN AN INDIVIDUAL TITLE VII SUIT IS ENTITLED TO PROSPECTIVE INJUNCTIVE RELIEF AGAINST HIS EMPLOYER TO PROHIBIT A RACIALLY DISCRIMINATORY PRACTICE OF PREFERRING BLACKS IN ITS HIRING POLICIES.

2. WHETHER AN EMPLOYER UNDER TITLE VII (42 U.S.C. §2000e ET SEQ.) AND UNDER 42 U.S.C. §1981 MUST BEAR THE BURDEN OF PROVING THAT IT WOULD HAVE REACHED THE SAME ADVERSE PERSONNEL DECISION IN THE ABSENCE OF A RACIALLY DISCRIMINATORY POLICY, WHEN THE EMPLOYEE SHOWS, BY DIRECT AND CIRCUMSTANTIAL EVIDENCE, THAT THE ADVERSE PERSONNEL ACTION WAS SUBSTANTIALLY MOTIVATED BY THE EMPLOYER'S RACIALLY DISCRIMINATORY POLICY.

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REFERENCE TO REPORT OF OPINIONS

The United States Court of Appeals for the Eleventh Circuit affirmed the trial court's judgment in Dybczak v. Tuskegee Institute, 737 F.2d 1524 (11th Cir. 1984), after the trial court and a jury found in favor of the Defendant on the Plaintiff's claims. See A-1 - A-22.

JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on August 1, 1984. A petition for rehearing and a suggestion for en banc consideration was denied by the United States Court of Appeals for the Eleventh Circuit on September 4, 1984.

The jurisdiction of this Honorable Court is posited on 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The relevant statutory provisions are set out in the appendix hereto as follows:

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STATEMENT OF THE CASE

Tuskegee Institute (hereinafter the Institute) is an institution of higher learning and both the student body and faculty are predominantly black. The Plaintiff, Zbigniew W. Dybczak, a white male, is currently serving as a tenured professor in the Institute's School of Engineering and prior to July, 1981, he had served as Dean of the School of Engineering for more than twenty (20) years.

In this action, Dr. Dybczak sought reinstatement to his position as Dean of the Engineering School, damages against the Institute for racial discrimination, and general injunctive relief against future discriminatory practices. The injunctive relief was sought in the United States District Court

for the Middle District of Alabama pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and his damage claim was based on 42 U.S.C. §1981.

During Dybczak's tenure as Dean of the School of Engineering, the Institute's administration expressed concern over his inability or unwillingness to recruit and hire more blacks for the Engineering faculty. Dr. Luther Foster, who was President of Tuskegee Institute in 1981 when the Plaintiff ceased to be the Engineering Dean, testified that the Institute needed black faculty members to serve as "role models" for its black students. At trial, Dr. Foster observed:

> "Still looking at the persons and remembering that one of the qualifications, certainly for some of the teachers, would be to be role models in terms of what a youngster can be. Our youngsters come out of the rural areas, many of them, and they take engineering sometimes because it sounds exciting. But if they could see a real [black] engineer who has gone somewhere and done some things, it would mean

something to them. It can be helpful in motivation."

Dean Dybczak had been the only white officer or associate general officer (including deans) at Tuskegee since 1970. (R. 55). Dr. Foster not only conceded that the Plaintiff did not discriminate against blacks in employing prospects for the Engineering faculty, but Foster also readily acknowledged that Dybczak "was trying to find the best [faculty members] he could find for the money that was available." (Tr. 286, 298-99). Nevertheless, this nondiscriminatory policy produced only 6 blacks in an Engineering faculty of 26. (Tr. 9-10).

Dr. Foster was satisfied that a sufficient number of black "role model" faculty members were present in the other schools on campus, "but not so in Engineering." (Tr. 297). (Emphasis added). It is undisputed, however, that from 1973 (Tr. 287) until 1982, when Dr. Foster gave his deposition, the In-

stitute was displeased with the Plaintiff's performance in not employing a larger number of black faculty members. (Tr. 27; 29; 287-88).

Dr. Foster had wanted the Plaintiff to be more aggressive in filling faculty positions with blacks. Specifically, he said "[w]e had the feeling that the pool he was drawing from was not nearly large enough and that it did not represent the availability of potential faculty members for Tuskegee." (R. 287).

On two different occasions, in 1973 and 1975, reports on the Plaintiff were generated which reflected the administration's concern that insufficient efforts were being made to recruit and hire blacks for the Engineering faculty. The Plaintiff was questioned several times after 1973 by the Institute's provost about what he (the Plaintiff) was doing to attract more black faculty members. (Tr. 27, 29).

In December of 1980, the Plaintiff discussed the terms of his continued employment as Dean of Engineering with Dr. Foster. (Tr. 36-40). The items of discussion included a one-year sabbatical leave, part of which the Plaintiff had previously been granted but had not taken (Tr. 36), the Plaintiff's salary (Tr. 36), and separate pay for research which the Plaintiff had previously performed. (Tr. 38). The Plaintiff and Dr. Foster exchanged correspondence addressing their respective positions, however on April 13, 1981, Dr. Foster indicated that he was not prepared to "negotiate further."

On June 5, 1981, Dr. Foster sent a letter to the Plaintiff (similar in nature to the ones forwarded to all other officers at about the same time), reappointing him as Dean of Engineering and setting his salary at $46,000. On June 19, 1981, the Plaintiff responded by saying "I am prepared to serve" as Dean of Engineering for the coming year sub-

ject to his salary level being raised "to the level appropriate to the highest seniority of a dean/professor of a professional field at Tuskegee," and subject to "the delayed sabbatical provisions promised several years ago [being] honored." Dr. Foster answered by letter dated June 22, 1981, saying he was "not prepared to negotiate further on these three matters," and asking for a reply "by Monday, June 29, 1981."

On July 2, 1981, the Plaintiff wrote Dr. Foster saying "I regret that I cannot accept your offer," whereupon the following day, Dr. Foster wrote the Plaintiff that he considered the Plaintiff's response to be a letter of resignation, that the resignation was accepted, and that he was appointing a black assistant professor, Dr. Warren F. Clayton, as acting Dean. At the time of his appointment as acting Dean, Dr. Clayton had also rejected his faculty contract offer for the 1981-82 school year.

The Plaintiff met with Dr. Foster on July 6 and told him that he had not resigned his position, and Dr. Foster told him to clear out of his office by the end of the week and that the Plaintiff had "outlived his usefulness to Tuskegee Institute." (Tr. 58). The Plaintiff followed up that conference with a letter to Dr. Foster the following day, saying "let me reiterate that I did not tender my resignation either as Dean or as a Professor of Engineering." Dr. Foster replied on July 9, 1981, that the Plaintiff's resignation had been accepted as Dean, and also as a faculty member unless the Plaintiff advised him in writing of his wishes to remain as a faculty member. The Plaintiff was ultimately retained as a tenured faculty member.

Since Dr. Foster was retiring as President on August 1, 1982 (Tr. 282), he was succeeded on that date by Dr. Benjamin F. Payton. (Tr. 458). The Plaintiff discussed

his retention or reappointment as Dean with the new President on August 12, 1981 (Tr. 68), and followed up that conference with a letter to Dr. Payton the following day. (Plaintiff's Exhibit 42). In that letter, the Plaintiff reiterated that he had not resigned as Dean, and stated that he had only engaged in "a customary attempt to negotiate." He pointed out to Dr. Payton that frequent contract rejections (including some in 1981) by faculty "have always led to subsequent compromise solutions." On August 17, 1981, Dr. Payton replied by saying "I want to repeat that I have no intention to reappoint you as Dean of the School of Engineering." (Plaintiff's Exhibit 43).

A search committee charged with the responsibility of making recommendations for the permanent position of Dean of Engineering was appointed on September 6, 1981. (Tr. 257). Although Dr. Dybczak had been recommended or nominated for reappointment di-

rectly to Dr. Payton by two faculty members, Payton neither forwarded these communications to the search committee, nor did he advise the faculty members to resubmit their nominations to the search committee.

Four candidates, all black, were invited to the Tuskegee campus to interview for the Dean's position, and although the Plaintiff's application was forwarded to and considered by Dr. Payton, one of the black candidates, Dr. Vascar Harris, was selected as Dean of the School of Engineering and he began serving in that capacity in August, 1982.

The Plaintiff's complaint, seeking relief under, inter alia, 42 U.S.C. §2000e et seq., was filed on June 8, 1982, and he sought a temporary restraining order, or alternatively, a preliminary injunction to prevent the Institute from filling the Dean's position on a permanent basis. A day-long evidentiary hearing was conducted on July 16,

1982, and thereafter, the trial court denied the motion for a preliminary injunction.

Subsequent to the filing of the initial complaint, the Plaintiff amended his complaint twice to include the 42 U.S.C. §1981 claim, for which a jury trial was demanded, and to challenge the Institute's policy of encouraging the employment of black faculty members as "role models."

The trial on the merits commenced on November 29, 1982, and at trial, the Plaintiff contended that his ouster as Dean of the School of Engineering and the Institute's failure to rehire or reappoint him as Dean when Dr. Harris was selected constituted racial discrimination.

The 42 U.S.C. §1981 claim for damages was tried to a jury, which returned a verdict for the Defendant on December 1, 1982. (R. 344). The Defendant, by a motion in limine, had sought to exclude evidence that Tuskegee had a policy of preferring black "role

models" in the employment of faculty members (R. 326-29), but the trial court allowed that evidence to be introduced.

The Plaintiff requested the court to charge the jury to the effect that if the pattern and practice of preferring blacks in employment was a substantial factor in the Defendant's decision not to retain or reappoint him as Dean, then the burden of proof shifted to the Defendant to show that the Plaintiff would not have been retained or reappointed even in the absence of such pattern or practice. (R. 319-20). Instead, the court charged that the jury could return a verdict for the Plaintiff only if the Plaintiff proved that the discriminatory pattern and practice was a substantial factor in the decision not to retain or reappoint the Plaintiff as dean, "and that the defendant would have retained or would have reappointed the plaintiff in the absence of such pattern and practice . . . ." (Tr. 525-26).

The Plaintiff's counsel objected to the trial court's failing to give the requested charge as to the shifting burden of proof (Tr. 536-38), and also raised that issue, among others, in his post-trial motion. (R. 357-58).

The trial court entered a judgment for the Defendant on the jury verdict (A-31 - A-32), and found in favor of the Defendant on the issues which had been reserved for the court. (A-33).

The Plaintiff timely appealed the trial court's judgments to the United States Court of Appeals for the Eleventh Circuit, contending that the trial court erred in refusing to grant prospective injunctive relief against the Institute's policy of preferring black "role models" for its faculty. The second issue raised on appeal involved the trial court's refusal to charge the jury that if the jury found that the "role model" preference policy was a substantial factor in the

Institute's decision to remove Dybczak from the Deanship or to select someone else to replace him, then the burden shifted to the Institute to prove that its employment decision would have been the same even in the absence of the "role model" preference policy.

The Eleventh Circuit rejected these contentions in Dybczak v. Tuskegee Institute, 737 F.2d 1524 (11th Cir.), reh. denied, 744 F.2d 97 (11th Cir. 1984).

ARGUMENT

I. A WHITE PROFESSOR, AS A PLAINTIFF IN AN INDIVIDUAL TITLE VII SUIT AGAINST HIS ACADEMIC EMPLOYER IS ENTITLED TO PROSPECTIVE INJUNCTIVE RELIEF AGAINST HIS EMPLOYER'S ADMITTED PRACTICE OF PREFERRING BLACK PROFESSORS AS "ROLE MODELS" FOR THE PREDOMINANTLY BLACK STUDENT BODY.

In the passage of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., Congress declared, in pertinent part, as follows:

> "(A) Employers. It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

> against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. §2000e-2(a).

In this case, the evidence unequivocally established that the Plaintiff, while serving as Dean of the School of Engineering, incurred the concern and displeasure of the Institute's administration by his failure to seek and hire more black faculty members in the School of Engineering to serve as black "role models" for the predominantly black student body.[1]

1. In the deposition of Dr. William Lester, the evi-

There can be little doubt based on the facts in this record, that the Institute's "role model" preference policy would tend to deprive white faculty candidates of employment opportunities in a manner contrary to the express language of 42 U.S.C. §2000e-(2)(a). Notwithstanding the clarity of the evidence on this point, the Eleventh Circuit refused to compel the issuance of prospective injunctive relief against the Institute's preferential hiring policy because such relief "in no way relates to the vindication of the plaintiff's rights." Dybczak v. Tuskegee Institute, 737 F.2d 1524, 1527 (11th Cir. 1984).

It has been held that an employer violates Title VII by creating or condoning an environment in the workplace which significantly and adversely affects the psycholog-

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dence reflected that approximately 96%-99% of the 3,600 students at Tuskegee Institute are black.

ical well-being of an employee because of his race, without regard to any other tangible detriment to the employee. Walker v. Ford Motor Company, 684 F.2d 1355, 1358 (11th Cir. 1982) (racial slurs). Accord, Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (sexual harassment).

This case presents a situation where a white Plaintiff, still employed as a professor at Tuskegee Institute, is seeking to vindicate his personal right to perform his job in an atmosphere free from his employer's admitted policy of preferring black professors. The law prohibits discrimination in the "terms, conditions and privileges of employment" and it certainly would include the proscription of an active and overt preferential hiring policy. This Honorable Court recognized as much in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 34 L.Ed 2d 415, 93 S.Ct. 364 (1972), a case in which it was held that whites as well as blacks may be

"persons aggrieved" within the meaning of the Civil Rights Act of 1968, 42 U.S.C. §3610(a), even where the prospective plaintiffs have not been subjected to a discriminatory housing practice.[2] This Court declared that existing tenants could allege an injury, personal to themselves, i.e., the loss of important benefits from interracial association, even though the existing tenants had not been the objects of the alleged discrimination.

It is in this sense that Dr. Dybczak can seek prophylactic injunctive relief to eradicate the discriminatory effect of Tuskegee Institute's hiring policies; he has a personal right, protected by Title VII, to work in an atmosphere unblemished by invidious racial discrimination. This case does not, therefore, present a situation where Dybczak

2. In Trafficante, the plaintiffs were tenants of an apartment complex which was alleged to discriminate against nonwhites in the rental of apartments.

is seeking to protect and vindicate the rights of nonparties and where injunctive relief is generally considered inappropriate, see, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 32 L.Ed 2d 627, 92 S.Ct. 1965 (1972), but rather, he is charging a violation of Title VII and seeking vindication of his own protected right "to work in an environment unaffected by racial discrimination." E.E.O.C. v. Mississippi College, 626 F.2d 477, 483 (5th Cir. 1980), cert. denied, 453 U.S. 912, 69 L.Ed 2d 994, 101 S.Ct. 3143 (1981) (white could challenge that her employer discriminated against blacks).

The propriety of injunctive relief once a discriminatory practice has been identified is settled. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 361, 52 L.Ed 2d 396, 431, 97 S.Ct. 1843 (1977). Indeed, it has been held that where there is abundant evidence of consistent past discrimination, "injunctive relief is manda-

tory absent clear and convincing proof that there is no reasonable probability of further noncompliance with the law." N.A.A.C.P. v. City of Evergreen, Alabama, 693 F.2d 1367, 1370 (11th Cir. 1982).

In this case, the Intitute has not presented any evidence, much less clear and convincing evidence, that the preferential hiring policy has been modified, therefore prospective injunctive relief was not only appropriate, but also necessary to vindicate the Plaintiff's personal interests and the important societal interests enbodied in Title VII. Accord, James v. Stockham Valves & Fittings Co., 559 F.2d 310, 354 (5th Cir. 1977), cert. denied, 434 U.S. 1034, 54 L.Ed 2d 781, 98 S.Ct. 767 (1978).

II. IF AN EMPLOYEE IN AN INDIVIDUAL ACTION PURSUANT TO 42 U.S.C. §1981 AND TITLE VII SHOWS BY DIRECT AND CIRCUMSTANTIAL EVIDENCE THAT AN ADVERSE PERSONNEL ACTION WAS SUBSTANTIALLY MOTIVATED BY HIS EMPLOYER'S RACIALLY DISCRIMINATORY POLICY, THE EMPLOYER MUST PROVE THAT IT WOULD HAVE REACHED THE SAME DECISION IN

THE ABSENCE OF THE RACIALLY DISCRIMINATORY POLICY.

There is authority for the proposition that if an illegal and discriminatory motive is proved to have been a substantial factor in an employment decision, a "defendant can rebut only by proving by a preponderance of the evidence that the same decision would have been reached even absent the presence of that factor." Lee v. Russell County Board of Education, 684 F.2d 769, 774 (11th Cir. 1982).

In Lee, supra, there was testimony that teacher discharges were racially motivated, and that the school board sought to maintain a "white presence" and to stop "white flight" away from the school. The board members also were said to have encouraged administrators to "build cases" against black teachers. The Eleventh Circuit said:

> "When a significant unconstitutional motive is ultimately proved, by either circumstantial or direct

evidence, the defendants' only form of rebuttal is under Mt. Healthy."[3]

684 F.2d at 769. (Emphasis added).

At the trial of this case, Dr. Foster, the Institute's former President, admitted that Dr. Dybczak employed the most capable faculty members he could find without regard to race, but that Foster remained concerned for "the next few years" after 1973 about the failure of the Plaintiff to draw from a larger "pool" to include more blacks. (Tr. 287-88). No such dissatisfaction existed in the cases of the deans of other schools at the Institute, all of whom were black. Thus, the direct testimony, drawn from the then-president of the Institute, shows conclusively that the discriminatory policy did exist and that, in its practical application,

3. In Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287, 50 L.Ed 2d 471, 97 S.Ct. 568 (1977), this Court established the "same result, anyway," defense.

Dr. Dybczak was considered the only violator.

Since direct testimony that the discriminatory policy existed and that it had an adverse impact only on Dr. Dybczak and his faculty is firmly established, it was the Plaintiff's position that the Lee standard was amply met. Accordingly, the Plaintiff asked the trial court to charge the jury that if the pattern and practice of preferring blacks in employment was a substantial factor in the Institute's decision not to retain or reappoint him as Dean, then the burden shifted to the Institute to prove that he would not have been retained or reappointed even in the absence of the discriminatory policy.[4]

The trial court refused to give the burden-shifting charge, and the Court of Appeals

4. The charge requested is quoted verbatim in the Court of Appeals' oppinion. See A-12, infra.

affirmed, holding that the evidence in support of the Plaintiff's position was not "directly probative of the Institute's intent when dealing with Dybczak in particular." 737 F.2d at 1528. (Emphasis in original). The only way which the evidence could have been more direct and probative would have been for Dr. Foster and Dr. Payton to admit that Dybczak's failure to hire more black faculty was the reason he was removed from and not reappointed to the Dean's position.

The fundamental defect in the court's instructions to the jury in the instant case is that the charge, as propounded, required the Plaintiff to prove two separate propositions. He not only had to prove (a) that the preferential hiring policy was a substantial factor in the Institute's decisions, but he also had to prove (be) that the same decision would not have been made without consideration of the prohibited reasons.

Under the Lee analysis, if the Plaintiff proved (a) above, by a preponderance of the evidence, then the burden shifted to the Defendant to prove, by a preponderance of the evidence, that the same decisions would have been made concerning the retention/reappointment of the Plaintiff as Engineering Dean, even absent the presence of that factor. Stated differently, if the Plaintiff proved (a) above, he had no further responsibility to prove (b). The instructions to the jury do not address the shifting burden of proof; therefore, the jury could not return a verdict in the Plaintiff's favor unless it found that he had proved both (a) and (b).

The Eleventh Circuit's analysis and explanation in the Lee case is entirely consistent with the traditional McDonnell-Douglas test, as refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed 2d 207, 101 S.Ct. 1089 (1981), when these two cases are read in light of the Mt.

Healthy case. These three cases, read together, establish the principle that if a Title VII (or 42 U.S.C. §1981) plaintiff satisfies the trier of fact by direct evidence that the employer acted with a discriminatory motive, the employer's burden is not to articulate a legitimate, non-discriminatory reason, Burdine, supra, but rather to prove that the same action or nonaction would have occurred anyway. Mt. Healthy, supra. The employer must sustain this burden of proof by a preponderance of the evidence. Lewis v. Smith, 731 F.2d 1535, 1539 (11th Cir. 1984).

This case represents a perfect example of the type of evil which was sought to be dealt with in Lee v. Russell County Board of Education, supra. As Lee aptly points out, the four-pronged prima facie case test of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed 2d 668, 93 S.Ct. 1817 (1973), requiring that the Defendant only "articulate" a legitimate, nondiscriminatory reason

for rejecting an employee simply is inappropriate where the Defendant has engaged in a long, established, and egregious practice of discrimination. In such instance, it is submitted that the law requires a Defendant to do something substantial and positive to escape liability. Requiring him to prove that his transgressions did not, after all, affect a particular employment decision seems to be extremely reasonable and appropriate.

CONCLUSION

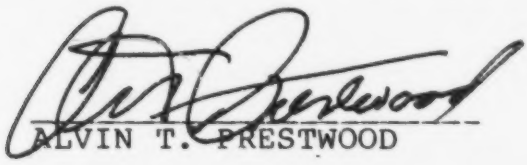
This Honorable Court is requested to grant the instant petition for writ of certiorari, because this case presents two important issues of federal law which have not been, but should be decided by this Court. Alternatively, it is asserted that the decision of the court below is in conflict with the decision of this Court in Trafficante v. Metropolitan Ins. Co., 409 U.S. 205, 34 L.Ed 2d 415, 93 S.Ct. 364 (1972), and Mt. Healthy City School District v. Doyle, 429 U.S. 274,

287, 50 L.Ed 2d 471, 97 S.Ct. 568 (1977).

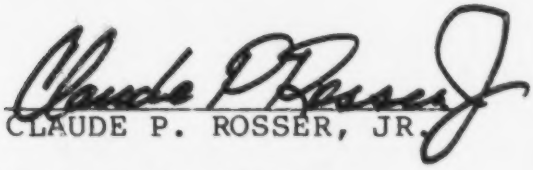
Although the Plaintiff has squarely challenged Tuskegee Institute's preferential hiring policy as a proscribed interference with his right to work in an atmosphere and environment free of overt preferential policy, the important policy considerations underlying Title VII are disserved by his inability to secure injunctive relief.

Additionally, and alternatively, the Court is asked to remand with instructions to grant a new jury trial and, upon such jury trial, to properly instruct the jury to the effect that if it finds from the evidence that the Defendant's racially discriminatory policy was a substantial factor in the decision not to retain or reappoint the Plaintiff as Dean of Engineering, that the Defendant can escape liability only by proving by a preponderance of the evidence that it would have treated the Plaintiff the same even absent the discriminatory policy.

Respectfully submitted,



ALVIN T. PRESTWOOD



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* * * * * * * * * * * * *

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon the Honorable Marvin S. Cohen, Honorable John M. Gibbons, and Honorable Fred D. Gray, Attorneys for the Respondent-Defendant, by placing said copies in the United States Mail, postage prepaid, being properly addressed to their respective business addresses as follows:

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This the 3 day of DECEMBER, 1984.

ALVIN T. PRESTWOOD

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an Alabama Corporation,

RESPONDENT-DEFENDANT

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

SUBMITTED BY:

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APPENDIX

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Zbigniew W. DYBCZAK,
Plaintiff-Appellant,

v.

TUSKEGEE INSTITUTE, an Alabama corporation, Defendant-Appellee.

No. 83-7037

United States Court of Appeals,
Eleventh Circuit.

Aug. 1, 1984.

Appeal from the United States District Court for the Middle District of Alabama.

Before KRAVITCH, JOHNSON and HATCHETT, Circuit Judges.

KRAVITCH, Circuit Judge:

In this employment discrimination action, plaintiff-appellant, Zbigniew W. Dybczak, challenges the district court's judgments in favor of defendant-appellee, Tuskegee Institute, entered on a jury verdict and on issues of equitable relief reserved to

the court. Specifically, Dybczak asserts that the district court erred (1) in refusing to enjoin the Institute's alleged adherence to a policy of preferring black role models on its faculty and (2) in failing to charge the jury on the defendant's burden of proving it would have made the same employment decisions in the absence of discrimination. Concluding that the court below did not err in these respects, we affirm.

I. FACTS AND PROCEEDINGS BELOW

Tuskegee Institute is an institution of higher learning, the student body and faculty of which are predominantly black. Zbigniew W. Dybczak, a white male of Polish descent, served as the dean of the School of Engineering at the Institute from 1960 to July 1981, after which he continued to serve as a professor of engineering. He was originally employed under a three-year contract, but after

1963 he served by appointment of the president on an annual basis. Of the Institute's eighteen officers in 1981, only Dybczak was white.

In December 1980, Dybczak began negotiations with the administration over the terms of his employment as dean for the 1981-82 academic year. In February 1981, he sent two memoranda to the president, Dr. L. H. Foster, seeking a significant increase in salary, one year of sabbatical and retroactive compensation tor independently performed research. On March 2, Dr. Foster offered Dybczak a 7% salary increase and leave for seven months with pay, but declined to compensate him for the previous research. In a letter dated March 21, Dybczak restated his demands. On April 13, Dr. Foster acknowledged Dybczak's letter, but stated, "I am not prepared to negotiate further on these three matters." On June 5, Dr. Foster sent a letter to Dybczak, reappointing him as dean with a 7% increase

in salary. On June 19, Dybczak replied that he was prepared to accept the reappointment subject to additional sabbatical and a salary increase. On June 22, Dr. Foster repeated that he was "not prepared to negotiate further on these three matters" and requested "a definite response to the offer and specific terms of your continued employment at Tuskegee." On July 1, Dybczak sent a one-sentence letter, stating, "I regret that I cannot accept your offer of April 13 and June 22." The next day, Dr. Foster responded that he regarded Dybczak's letter as a rejection of the offer of employment and that he accepted Dybczak's resignation. After a series of letters and a conference, Dr. Benjamin F. Payton, who succeeded Dr. Foster as president on August 1, 1981, offered to renew Dybczak's appointment as a tenured professor and to authorize seven months' sabbatical. Dybczak accepted the offer "under protest."

In September 1981, Dr. Payton appointed

a search committee to solicit applications and nominate candidates for the newly vacated position of dean. The committee ultimately nominated four candidates. Although Dybczak did not apply for the position until the published deadline had expired, his application was forwarded to Dr. Payton. Dr. Payton appointed Dr. Vascar Harris, a black aerospace engineer, as dean, effective August 15, 1982.

In his complaint, as amended, Dybczak alleged that the Institute had discriminated against him in his employment on the basis of his race and national origin. He sought reinstatement, back pay and attorney's fees under Title VII, 42 U.S.C. § 2000e, and damages under section 1981, 42 U.S.C. § 1981. The complaint also prayed for a temporary restraining order or, in the alternative, a preliminary injunction enjoining the Institute from appointing anyone other than Dybczak as dean and ordering the Institute to reinstate Dybczak as dean, and for a perma-

nent injunction enjoining future discrimination against Dybczak. After a hearing, the district court denied preliminary injunctive relief. In his motion for partial summary judgment, Dybczak asserted that he was entitled to an injunction against the Institute's pattern and practice of discriminating in the implementation of a faculty hiring policy favoring blacks over whites as role models. Dybczak's motion for partial summary judgment and the Institute's motion for summary judgment were denied by the court.

Evidence adduced at trial indicated that in 1973 and 1975, the administration had been concerned about the number of blacks on the School of Engineering faculty. Dr. Foster testified that hiring blacks had been considered important because of their ability to serve as role models for the students and that he had been concerned about Dybczak's failure to seek more black applicants for the pool from which new faculty members were

chosen. With respect to Dybczak's qualifications, Dr. Foster noted problems with Dybczak's performance of administrative duties, his desire to operate more autonomously and his apparent insensitivity to the overall mission of the Institute. With respect to Dr. Harris' qualifications, on the other hand, Dr. Payton testified that Dr. Harris' experience and scholarship in engineering fields related to aerospace science were important as Dr. Payton planned to reorient the School of Engineering and to introduce a program in aerospace science. He also identified Dr. Harris' general academic qualifications, his military service and his prior work with the dean of a larger engineering school as factors in his favor. The jury returned a verdict for the Institute on December 1, 1982, and on December 3, 1982, the district court entered a judgment on the verdict and a judgment denying equitable relief.

II. DENIAL OF INJUNCTION

Dybczak asserts that regardless of whether he was adversely affected by the Institute's alleged "policy of preferring the recruitment of black 'role model' professors," the policy constitutes a pattern and practice of discrimination warranting injunctive relief. In his brief, he states:

> The Plaintiff's position is that he was entitled to an injunction prohibiting the Defendant's continued adherence to its pattern and practice of discrimination even if that pattern and practice did not cause the Plaintiff's loss of employment as dean or if it did not cause the Defendant not to reemploy him as dean.

It is well settled that where claims at law and in equity are joined and the legal claims are tried separately by a jury, the jury's verdict operates as a finding of fact binding on the trial court in its determina-

tion of the equitable claims. As the court observed in Williams v. City of Valdosta, 689 F.2d 964 (11th Cir. 1982), "all findings necessarily made by the jury in awarding the verdict to [a party] are binding on the parties as well as on the trial court." Id. at 976. Insofar as the jury's verdict in this case establishes that the Institute did not discriminate against Dybczak,[1] the question presented is whether an injunction which may benefit nonparties (white faculty candidates other than Dybczak), but which is wholly unrelated to the rights of the plaintiff (Dybczak) is mandatory in an individual action.

1. Put more precisely, the jury verdict establishes that with respect to the Institute's failure to retain Dybczak as dean, either it did not discharge him or it did not discriminate against him in discharging him, and that with respect to the Institute's failure to reappoint Dybczak as dean, it did not discriminate against him. For present purposes, the distinction between a no discharge finding and a no discrimination finding is not significant.

In Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972), the Ninth Circuit recognized that injunctive relief which "may incidentally benefit many persons not before the court" is appropriate if "necessary to give a plaintiff or a group of plaintiffs relief to which they are entitled." Id. at 633-34. The court expressly disapproved of "injunctive benefits for nonparties [which are] neither incidental nor necessary to the resolution of the pending litigation." Id. at 634. In Meyer v. Brown & Root Construction Co., 661 F.2d 369 (5th Cir. 1981), the Fifth Circuit observed:

> Injunctive relief which benefits nonparties may sometimes be proper even where the suit is not brought as a Rule 23 class action. ... The court in Gregory noted that there are many cases where injunctive relief designed to assist a party will accidentally assist persons not before the court. This is not a case where injunctive relief need be designed for a just disposition of the action. That portion of the

judgment granting injunctive relief is therefore reversed.

Id. at 374. From these precedents, we conclude that in a suit brought in the plaintiff's individual capacity, injunctive relief benefiting nonparties is not required if it in no way relates to the vindication of the plaintiff's rights. Accordingly, we hold that the district court did not err in refusing to enjoin the Institute's alleged adherence to a policy favoring blacks in faculty hiring.[2]

III. JURY INSTRUCTIONS

Dybczak contends that the jury was im-

2. Gregory and Myer cannot be distinguished on the ground that the plaintiffs in those cases did not ask for injunctive relief, whereas Dybczak asked for such relief, but was not entitled to it. The point is that regardless of the reason, injunctive relief for the individual plaintiffs was inappropriate in all three cases.

properly charged on the burden of proof with regard to discrimination. The jury, he argues, should have been instructed that once the plaintiff makes a prima facie showing

> that the Defendant's pattern and practice of preferring blacks in employment at Tuskegee Institute was a substantial factor in the decision of the Defendant not to retain him or not to reappoint him as Dean .... then the Defendant has the burden of satisfying you, by a preponderance of the evidence, that the decision not to retain him or not to reappoint him as Dean would have been made in the absence of the Defendant's pattern and practice.

Dybczak relies on Lee v. Russell County Board of Education, 684 F.2d 769 (11th Cir. 1982), in which this court stated:

> Once an unconstitutional motive is proved to have been a significant or substantial factor in an employment decision, defendant can rebut only by proving by a preponderance of the evidence that the same decision would have been reached even absent the presence of that factor.

Id. at 774 (footnote omitted).

The Institute responds that the correct allocation of burdens is that outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and explained in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). In McDonnell Douglas, the Court set forth a three-step analysis: (1) "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination," 411 U.S. at 802, 93 S.Ct. at 1824; (2) "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection," id.; (3) The plaintiff may still prevail if he shows that the defendant's "stated reason for [the plaintiff's] rejection was in fact pretext," id. at 804, 93 S.Ct. at 1825. The In-

stitute asserts that it succeeded in articulating legitimate, nondiscriminatory reasons for Dybczak's rejection and that the district court was therefore correct in charging on the plaintiff's burden of proving pretext.

In Lee, the court explained that whether the Lee standard or the McDonnell Douglas standard applies in an employment discrimination case depends on whether the plaintiff succeeds in proving discriminatory motive with direct evidence. The court observed:

> The McDonnell Douglas analysis is "[i]ntended progressively to sharpen inquiry into the illusive factual question of intentional discrimination," Burdine, 450 U.S. at 254 n. 8 [101 S.Ct. at 1094 n. 8], where the plaintiff's case is made out with circumstantial evidence supporting the inference of discrimination, id. at 253 [101 S.Ct. at 1093]. Where a case of discrimination is made out by direct evidence, reliance on the ... test developed for circumstantial evidence is obviously unnecessary. Moreover, where a case for discrimination is proved by direct evidence it is incorrect to rely on a

McDonnell Douglas form of rebuttal."

684 F.2d at 773-74 (citations omitted (emphasis in original); see also Bell v. Birmingham Linen Service, 715 F.2d 1552, 1556-57 (11th Cir. 1983) ("If the evidence consists of direct testimony that the defendant acted with a discriminatory motive, and the trier of fact accepts this motive, the ultimate issue of discrimination is proved. Defendant cannot refute this evidence by mere articulation of other reasons"); Perryman v. Johnson Products Co., 698 F.2d 1138, 1143 (11th Cir. 1983) ("If the factfinder believes the direct evidence presented by the plaintiff .... the burden shifts to the defendant to prove by a preponderance of the evidence that the adverse action would have been taken even in the absence of a discriminatory motive"); accord Toney v. Block, 705 F.2d 1364, 1367 (D.C. Cir. 1983). Dybczak's strongest evi-

dence consists of Dr. Foster's testimony regarding the importance of black role models on the faculty and the concern, in 1973 and 1975, about Dybczak's efforts to find more black applicants. Dybczak also relies on evidence demonstrating that a high percentage of the faculty is black and that other deans, who were black, were allowed to negotiate their contracts without losing their posts. As this evidence is not directly probative of the Institute's intent when dealing with Dybczak in particular, we conclude that the charge suggested by Lee would have been inappropriate.

The question, then, is whether the jury was properly charged under McDonnell Douglas.[3] We must determine whether the

3. Although McDonnell Douglas is a Title VII case, whereas the issues tried by the jury in this case relate to Dybczak's section 1981 claim, "it is well established that such a claim may be analyzed under the McDonnell Douglas structure developed in Title VII suits." Lee, 684 F.2d at

Institute met its burden of articulating legitimate, nondiscriminatory reasons for its actions and, if so, whether the jury was correctly instructed on the plaintiff's burden of proving pretext.[4]

In Burdine, the Court explained the second step of the McDonnell Douglas analysis as follows:

> 773. Hence, McDonnell Douglas provides the controlling standard even though it did not involve a jury charge under section 1981.

4. Implicit in this approach is the assumption that the trial court need not instruct the jury on the defendant's burden of articulating a legitimate, nondiscriminatory reason for its action. As the Court pointed out in Burdine, the McDonnell Douglas analysis "serves to bring the litigants and the court expeditiously and fairly to [the] ultimate question" of discrimination. 450 U.S. at 253, 101 S.Ct. at 1093-94. Where the plaintiff has made out a prima facie case and the defendant has responded with a legitimate, nondiscriminatory reason, the "ultimate question" for the jury is that of pretext. The antecedent question whether the defendant has met its "burden of production," id. at 255 n. 8, 101 S.Ct. at 1094 n. 8, is for the court to answer in deciding how to instruct the jury on the plaintiff's burden of proof.

> The burden that shifts to the defendant ... is to rebut the presumption of discrimination by producing evidence that plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

450 U.S. at 254-55, 101 S.Ct. 1094 (citation and footnote omitted).

In connection with its failure to retain Dybczak as dean, the Institute presented evidence of at least two legitimate reasons: Dybczak's adamant demands concerning nonnegotiable terms of employment and his delinquency in fulfilling certain administrative responsibilities. In connection with the Institute's failure to reappoint Dybczak as

dean, there is also evidence of the eventual appointee's superior qualifications, especially his familiarity with aerospace science. By articulating these nondiscriminatory reasons, the Institute plainly satisfied its burden under McDonnell Douglas.

The plaintiff's burden of proving pretext was described in McDonnell Douglas as that of demonstrating "by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." 411 U.S. at 805, 93 S.Ct. at 1826. The Burdine Court explained:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer

> or indirectly by showing that the employer's proffered explanation is unworthy of credence.

450 U.S. at 256, 101 S.Ct. at 1095.

In this case, the district court charged:

> Now, with regard to his claim of termination because of race, Dr. Dybczak, in order to prevail, must prove certain things. One, that his actions concerning the terms of his contract were not the equivalent of a resignation, and that he was discharged by Tuskegee Institute from his position as Dean by Tuskegee's refusal to renew his employment for the 1981-82 school year. If he's not proved that he was discharged, you must find in favor of Tuskegee Institute on this claim. Second, if, on the other hand, you find that he was discharged, Dr. Dybczak must prove that the reasons given by the Institute for not continuing him in the position as Dean were a pretext for discrimination on the basis of race and that the real reason for the termination of the plaintiff was because of his race and that the reasons offered by the defendant for the plaintiff's termination were in fact a cover-up for racial discrimination.

> With regard to his claim of discrimination in the selection of a new Dean of the Engineering School in 1982, Dr. Dybczak must prove, one, that he was qualified to do the job. If he has not proved that he was qualified, you must find in favor of Tuskegee on this claim. Second, if, on the other hand you find that he was qualified for the job, Dr. Dybczak must prove that the reasons given by the Institute for not selecting Dr. Dybczak to be Dean were a pretext for discrimination on the basis of race and that the real reason for the nonselection of plaintiff was because of his race and that the reasons offered by the defendant, Tuskegee, for plaintiff's nonselection were in fact a cover-up for racial discrimination.

As this instruction accurately reflects the plaintiff's burden under McDonnell Douglas,[5] we hold that there was no error in the jury charge.

5. Elsewhere in its charge to the jury, the district court, referring to the pretext analysis, stated, "If you find from a preponderance of the evidence that the defendant would have retained or would have reappointed the plaintiff in the absence of [discrimination], then you may return a verdict in favor of the plaintiff and against the defen-

For these reasons, the judgments of the district court are AFFIRMED.

dant." To the extent that it focuses on the question whether the defendant's motive was actually discriminatory, not the hypothetical question whether the defendant would have taken the same action even if there had been no discriminatory purpose, we think that formulation of the burden in terms of the pretextual nature of the articulated reason is preferable. Given the portion of the charge quoted in the text, however, the district court's use of the other formulation, in itself, scarcely amounts to reversible error.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ZBIGNIEW W. DYBCZAK	)	FILED
PLAINTIFF	)	DEC 3 1982
		CLERK
vs.	)	U.S. DIST. COURT
		MIDDLE DIST. OF
TUSKEGEE INSTITUTE,	)	ALA.
an Alabama corporation	)	DEPUTY CLERK, BY
		CIVIL ACTION NO. 82-
DEFENDANT	)	117-E

MEMORANDUM OPINION

A jury trial of the above styled cause was held commencing November 29, 1982. By consent of the parties, and before the trial commenced, the issues of an award of back pay and reinstatement were reserved for ruling by the Court. By its verdict in favor of defendant, the jury determined that Tuskegee Institute had not racially discriminated against plaintiff. This Court also finds that the termination of Dr. Dybczak's employ-

ment was not for racial reasons, nor was it based on any racial discrimination, but was the result of plaintiff unequivocally declining to continue to serve as dean under a proposed contract of employment which for at least two months, defendant had repeatedly advised Dr. Dybczak was not negotiable. It is undisputed that plaintiff would have been continued in his employment as dean if he had agreed to the proposed terms of employment which he unequivocally rejected.

This Court further finds that the decision not to select plaintiff as dean when he subsequently applied was not racially motivated. How the Court may feel about the relative qualifications of Dr. Dybczak and his successor is irrelevant. The task of weighing qualifications of various candidates for the position of dean was a proper function of the President of Tuskegee Institute. This Court merely finds that the President did not act for racially discriminatory reasons in

declining to hire as dean for the year 1982-83 the same individual who had turned down the offer for 1981-82 and had thereby vacated the deanship.

It is clear from the foregoing that this Court finds that the jury's verdict was supported by substantial evidence and was in accord with the great weight of the evidence. All findings necessarily found by the jury in favor of Tuskegee Institute are binding on the parties as well as the Court. The trial court is required to exercise its limited discretion to determine the propriety of awarding equitable relief based on the facts as found by the jury. (Emphasis the Court's). Williams v. City of Valdosta, 689 F.2d 964 (11th Cir. 1982).

What has been stated in reference to back pay and reinstatement for plaintiff's Section 1981 claim is also applicable to plaintiff's Title VII claim, and plaintiff is not entitled to the relief sought with re-

spect to his Section 1981 claim or Title VII claim.

A separate judgment will be entered in accordance with this opinion.

DONE this 3rd day of December, 1982.

/s/ Truman Hobbs
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-7037

D.C. DOCKET NO. CV-82-117-E

ZBIGNIEW W. DYBCZAK,

Plaintiff-Appellant,

versus

TUSKEGEE INSTITUTE, an
Alabama corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

Before KRAVITCH, JOHNSON and HATCHETT, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United

States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 1, 1984
For the Court: Spencer D. Mercer, Clerk

By: /s/ Miguel J. Cortez, Jr.
Deputy Clerk

ISSUED AS MANDATE: Sep 17 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-7037

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED

SEP 4 1984

Spencer D. Mercer
Clerk

ZBIGNIEW W. DYBCZAK,

Plaintiff-Appellant

versus

TUSKEGEE INSTITUTE, an
Alabama corporation,

Defendant-Appellee.

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Appeal from the United States District Court
for the Middle District of Alabama

- - - - - - - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 1, 1984, 11 Cir. 198__, _____ F.2d _____).

(September 4, 1984)

Before KRAVITCH, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ZBIGNIEW W. DYBCZAK	)	FILED
PLAINTIFF	)	DEC 3 1982 CLERK U.S. DIST. COURT MIDDLE DIST. OF ALA. DEPUTY CLERK, BY _____
vs.	)	
TUSKEGEE INSTITUTE, an Alabama corporation	)	
DEFENDANT	)	CIVIL ACTION NO. 82-117-E

JUDGMENT

On the 1st day of December, 1982, after this cause has been submitted to a jury, a verdict was retured [sic] by said jury as follows:

> "We, the Jury, find the issues in favor of the defendant, Tuskegee Institute, an Alabama corporation.
>
> "This the 1 day of December, 1982.
>
> /s/ George K. Kiesel
> FOREPERSON"

It is, therefore, the ORDER, JUDGMENT and DECREE of the Court that plaintiff have and recover nothing of the defendant, Tuskegee Institute, on those issues submitted to the jury. A separate judgment will be entered on those issues reserved for ruling by the Court.

It is further ORDERED that the court costs incurred in this proceeding be and are hereby taxed against plaintiff, for which execution may issue.

DONE this 3rd day of December, 1982.

/s/ Truman Hobbs

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ZBIGNIEW W. DYBCZAK	)	FILED
PLAINTIFF	)	DEC 3 1982
		CLERK
vs.	)	U.S. DIST. COURT
		MIDDLE DIST. OF
TUSKEGEE INSTITUTE, an Alabama corporation	)	ALA.
	)	DEPUTY CLERK, BY
		CIVIL ACTION NO. 82-
DEFENDANT	)	117-E

JUDGMENT

In accordance with the memorandum opinion entered this date, it is ORDERED that plaintiff is denied any relief as to his claim for back pay and reinstatement instant to his Section 1981 claim and his Title VII claim.

DONE this 3rd day of December, 1982.

/s/ Truman Hobbs
UNITED STATES DISTRICT JUDGE

42 U.S.C. §2000e-2. Discrimination because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(f) Civil Action by Commission, Attorney General, or person aggrieved. (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, government agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, government agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under section (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in

a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investiga-

tion, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [42 USCS §§ 2000e et seq.]. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code [28 USCS §§ 1404, 1406], the judicial district in which the respondent has his principal

office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; affirmative action; equitable relief. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such

affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS § 2000e-3(a).

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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Case No. 84-898

IN THE

Supreme Court of the United States

1984-85 TERM

ZBIGNIEW W. DYBCZAK,
Petitioner,

v.

TUSKEGEE INSTITUTE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where a plaintiff in an employment discrimination case sought only specific injunctive relief and damages and the jury found against plaintiff, did the trial court err in refusing to enjoin alleged generally discriminatory employment conduct, particularly when such general injunction would not benefit plaintiff?

2. In the absence of credible evidence that a discriminatory motive was a significant or substantial factor in the complained of employment decisions concerning plaintiff, did the trial court err in refusing to instruct the jury that the burden of proof had shifted to the defendant?

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STATEMENT OF THE CASE

This proceeding is before the Court on petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit that affirmed a jury verdict and trial court judgment and order in favor of respondent. *Dybczak v. Tuskegee Institute*, 737 F.2d 1524 (11th Cir.) *reh. denied*, 744 F.2d 97 (1984).

A. Course of Proceedings and Dispositions in the Courts Below

Petitioner instituted this action by filing a complaint in the United States District Court for the Middle District of Alabama, alleging, in essence, that he had been discriminated against in his employment by respondent on the basis of race. He sought reinstatement as Dean of the School of Engineering of Tuskegee Institute, back pay and attorneys' fees under Title VII of the

Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and damages under 42 U.S.C. § 1981.

The case was tried to a jury which returned its verdict in favor of respondent Tuskegee Institute. Subsequently the trial court entered judgment on the jury verdict, issued its memorandum opinion and entered judgment in favor of respondent on the issues of equitable relief reserved to the court.

The Court of Appeals affirmed the judgments of the district court. It held that "in a suit brought in the plaintiff's individual capacity, injunctive relief benefitting non-parties is not required if it in no way relates to the vindication of the plaintiff's rights." *Dybczak*, 737 F.2d at 1527, Pet. A-11. The Court also found that the jury was properly instructed under the standard articulated in *McDonell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

B. Statement of the Facts

This case arose from a dispute over salary and other terms of petitioner's reappointment as Dean of the School of Engineering at Tuskegee Institute for the academic year 1981-82. Petitioner was originally employed as Dean in 1960 under a three year contract. After 1963 he served by appointment of the President on an annual basis.

Petitioner began negotiations with the administration of the Institute in December 1980 over the terms of his reappointment as dean for the 1981-82 academic year. In February 1981, petitioner continued this dialogue by sending memoranda to the President. Petitioner sought a significant salary increase which would have made him the highest paid dean at the Institute. He also requested one year of sabbatical leave with pay beginning on December 22, 1981, and retroactive compensation for time allegedly spend during vacations on outside funded research projects in 1979 and 1980. Dr. L. H. Foster, the then President of the

Institute, responded to these demands by letter dated March 2, 1981 in which he offered petitioner a salary for the 1981-82 school year of $46,000 (a three thousand dollar, 7% increase over his existing salary) as well as sabbatical leave for one semester plus one summer. Dr. Foster in conformance with standard Institute policy declined to compensate petitioner retroactively for the research work performed on outside funded research projects during his vacations in earlier years. Petitioner responded on March 21, 1981 restating his demands.

By letter of April 13, 1981, Dr. Foster reiterated the Institute's policy on sabbatical leave and explained in detail the basis for the salary offer to petitioner. He also advised petitioner that he was not prepared to negotiate further on the matters of salary, sabbatical leave and retroactive compensation for vacation research work.

On June 5, 1981 Dr. Foster wrote petitioner a letter reappointing him as Dean of the School of Engineering for the year ending May 31, 1982 at an annual salary of $46,000; a salary that was exceeded only by those of the President of the Institute and the Dean of the School of Veterinary Medicine. By letter of June 19, 1981 petitioner replied that he was prepared to accept the reappointment subject to the Institute's honoring unspecified "delayed sabbatical provisions promised several years ago" and a salary increase to a level which he contended should be exceeded only by the salaries of the President and the Provost of the Institute.

By letter of June 22, 1981, Dr. Foster again stated the offer set forth in his letters of April 13th and June 5th and again emphasized he was not prepared to negotiate further. On July 1, 1981, petitioner wrote Dr. Foster a letter stating, in its entirety, "I regret that I cannot accept your offer of April 13 and June 22." The next day Dr. Foster, responded informing petitioner that he regarded the letter of July 1 as a rejection of the contract of employment as Dean of the School of Engineering and accordingly accepted petitioner's resignation. After accepting petitioner's resignation President Foster appointed Dr. Warren Clay

ton, a black American as Acting Dean of the School of Engineering.

Dr. Benjamin F. Payton became the President of Tuskegee Institute on August 1, 1981. On August 12, 1981, Dr. Payton had an extensive discussion with petitioner concerning the problems petitioner felt he had with the Institute. Petitioner subsequently wrote Dr. Payton summarizing his grievances and asking him to void Dr. Foster's actions concerning his reappointment as dean. Dr. Payton did not reappoint petitioner as dean. He did, however, affirm petitioner's appointment as a tenured professor of mechanical engineering and authorized a paid leave of absence from August 1, 1981 to May 31, 1982. Petitioner accepted Dr. Payton's offer "under protest." He is currently employed as a professor of engineering at Tuskegee Institute.

In September 1981, President Payton appointed a search committee to solicit applications and nominate candidates for the position of Dean of the School of Engineering. The Committee ultimately recommended four candidates for Dr. Payton's consideration. Petitioner did not apply for the position until after the published deadline had expired and after the Committee had concluded its activities; his application and resume were, however, forwarded to Dr. Payton and he considered petitioner's qualifications when selecting a new dean.

As the new President, Dr. Payton planned to reorient and expand the School of Engineering at Tuskegee Institute. One particular aspect of that plan was the institution of a new program in aerospace science. Based on his appraisal of Dr. Vascar Harris' general academic qualifications and experience and his particular qualifications and interests in engineering disciplines related to aerospace science, Dr. Payton appointed him as Dean of the School of Engineering effective August 15, 1982.

During the course of this litigation, documentary evidence from petitioner's personnel file was introduced indicating that in 1973 former President Foster had received a report that some faculty members felt the petitioner was not employing enough blacks on his faculty, and that this matter was raised again in

1975. Dr. Foster did not believe petitioner was as knowledgeable of some of the pools of black engineering teachers from which to recruit faculty as he might have been. When questioned about this, he stated that in 1973:

> We had the feeling that the pool that he (petitioner) was drawing from was not nearly large enough and that it did not represent the availability of potential faculty members for Tuskegee.

He further stated:

> Well, I think he was not tapping them as much as he might. Still looking at the persons and remembering that one of the qualifications, certainly for some of the teachers, would be to be role models in terms of what a youngster can be. Our youngsters come out of the rural areas, many of them, and they take engineering sometimes because it sounds exciting. But if they could see a real engineer who has gone somewhere and done some things, it would mean something to them. It can be helpful in motivation.

It was clear that Dr. Foster's main policy was to hire the best qualified faculty available regardless of race. In that regard, he testified:

> As I was saying just a moment ago, we were looking for role models from the total society in order to provide the experiences and educational development for our student body that came from the whole society, and black role models would be a part of that total picture.
>
> * * *
>
> We felt that the—to provide the total experience for our students in Engineering, that it would be well if there were some more blacks; but our main concern was to have quality teachers; and what we always were really pushing for was a pool of candidates that from which the best qualified might be selected and we knew there was difficulty in—sometimes in finding blacks, but the situation had been improving generally in recent years, and we thought that that would be—with a larger pool, that there would be the likelihood that there would be some more blacks on the—on the faculty.

After this issue first arose in 1973, Dr. Foster reappointed petitioner as Dean of the School of Engineering every year to and including 1981.

Dr. Foster's testimony showed that regardless of his concern for providing appropriate role models for the students at Tuskegee Institute that factor had no bearing whatsoever on his acceptance of petitioner's resignation as dean after he rejected the offer of reappointment in 1981. Under cross examination at trial he responded:

> Q. Doctor, there has been extensive testimony here back in '73 and '75, you talked about, at least you characterize it in your deposition this year, about some black role models and wanting more black faculty members?
> A. Uh, huh.
> Q. When you accepted Dr. Dybczak's resignation in July, did you consider at all your conversations with him or your desire to have black role models?
> A. No.
> Q. Did that come in the picture?
> A. No, no.
> Q. Were you trying to just get rid of him?
> A. No, indeed; he was trying to get rid of us, we thought. He declined our offer.

With regard to schools other than the School of Engineering, plaintiff's counsel asked Dr. Foster whether he had told other deans at Tuskegee that they needed to employ more black faculty; Dr. Foster responded:

> No, I don't think I had . . . . As a matter of fact, we were moving in the other direction in the other departments of reducing the number of black faculty and increasing the number of others, in order to provide this total larger ambience in (sic) setting for our students.

This was the only evidence presented in support of petitioner's allegation that respondent had a purported policy of preferring blacks in the employment of faculty. There was no evidence whatsoever that blacks had ever been preferred over other races

in the actual employment of faculty in any of the Institute's colleges or schools.

SUMMARY OF ARGUMENT

A. There was no evidentiary basis for concluding that Tuskegee Institute followed any pattern, practice or policy of preferring the employment of black faculty members over faculty members of other races. Even if there had been, the facts in this case did not warrant the issuance of a prospective class-wide injunction against such pattern, practice or policy, since petitioner is a tenured professor who would not have benefitted from such an injunction. In an individual employment discrimination case, broad injunctive relief is not warranted unless it is incidental or necessary to the resolution of the pending controversy.

The Court of Appeals for the Eleventh Circuit concluded that in this suit, which was brought by petitioner in his individual capacity, injunctive relief benefiting nonparties was not required because it in no way related to the vindication of petitioner's rights. This holding raises no unsettled question of federal law or conflicts with the decisions of this Court or other federal courts of appeals which would warrant further review.

B. There was no evidence that a discriminatory motive was a significant or substantial factor in the Institute's decisions concerning petitioner's reappointment as dean. Consequently, the trial court correctly instructed the jury under the principles established in *McDonnell Douglas* and *Burdine*. It was not error to reject a *Lee* v. *Russell County Board of Education* instruction shifting the burden of proof to defendant.

No new issue of law has been presented; no conflict among the federal courts of appeals is alleged. The only issue raised by petitioner is sufficiency of the evidence below. The trial court and the appeals court having found that the evidence presented did not support giving the *Lee* instruction, no issue of sufficient import exists here to justify review by this Court.

ARGUMENT

This is a case in which the Dean of the School of Engineering of Tuskegee Institute refused to accept reappointment unless his demands for salary and other benefits were met. When the Institute replaced him as dean, petitioner, a male Caucasian, brought this action seeking reinstatement on the basis of alleged racial discrimination.

The only evidence petitioner was able to present at trial which related to possible discrimination was that in 1973 and 1975, the former president of the Institute was concerned that petitioner was not seeking more black applicants for the pool from which Engineering faculty was chosen, thereby increasing the possibility that engineering students might have black role models among the faculty. Notwithstanding this concern of the former president, he reappointed petitioner as dean every year after 1973 up to and including 1981. Petitioner's position as dean terminated only after he unequivocally rejected reappointment tendered to him in 1981, which included an increase in salary and a paid leave of absence.

After hearing all of the evidence, the jury and the trial court found for the Institute. On appeal petitioner claimed that the former president's concern about role models in the School of Engineering constituted a "pattern, practice and policy of encouraging the employment of black faculty members over faculty members of other races." He sought an injunction of prospective general application against such pattern, practice and policy.

Petitioner also contended that the "role model" evidence warranted a jury instruction under *Lee v. Russell County Board of Education* shifting the burden of proof from plaintiff to defendant, rather than the *McDonnell Douglas—Burdine* instruction actually given by the trial court.

The Court of Appeals found both contentions to be without merit.

A. Petitioner Is Not Entitled to An Injunction Against An Alleged Practice of Preferring Blacks in Employing Faculty

Petitioner seeks review in this case to establish that he is entitled to an injunction barring respondent's alleged policy of preferring black "role models" in hiring faculty. In support of his assertions he relies principally on *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 34 L.Ed.2d 415, 93 S.Ct. 364 (1972); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 52 L.Ed.2d 396, 97 S. Ct. 1843 (1977) and *NAACP v. City of Evergreen*, 693 F.2d 1367 (11th Cir. 1982).

Respondent's reliance is misplaced. *Trafficante* held only that the Civil Rights Act of 1964 gave "standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute." *Trafficante*, 409 U.S. at 211, 34 L.Ed.2d at 420. That case clearly concerns only standing because the District Court had dismissed the complaint on that basis and had not reached the merits before appellate review. Thus, it cannot stand as precedent for granting a remedy in a case where a jury has found in favor of defendant on the plaintiff's charges of racially discriminatory hiring practices. Most assuredly the decision of the Court of Appeals in the instant case cannot be said to be in conflict with the decision of this Court in *Trafficante*.

The issue in *Evergreen* was whether prospective injunctive relief was appropriate when the illegal conduct sought to be enjoined had ceased. The trial court had found that the discrimination complained of no longer existed and declined to issue an injunction. On appeal the Court held "[a]lthough the court found that discrimination no longer exists, the power to issue an injunction survives discontinuance of the illegal conduct sought to be enjoined." *Evergreen*, 693 F.2d at 1370. The decision rests on the holding that:

> The district judge clearly erred in stating that "[i]t is insignificant whether this change is due to the filing of the EEOC charge and this suit." Courts should keep in mind the oft-

> repeated observation that "reform timed to anticipate or blunt the force of a lawsuit offer[s] insufficient assurance that the practice sought to be enjoined will not be repeated." *Id.*

It was clear in *Evergreen* that there was "abundant evidence in the record of consistent past discrimination" and in fact the trial court found that discrimination had been practiced. The only issue was whether injunctive relief should be granted. In contrast the only evidence from which petitioner in the present case sought to imply discrimination was scattered testimony that the former President of Tuskegee Institute had been concerned with the scarcity of black role models in the School of Engineering. The incidents cited in support of this allegation occurred in 1973 and 1975, many years before petitioner rejected his reappointment as Dean of the School of Engineering which led to this lawsuit. There is also ample rebuttal evidence from the former President that it was always his policy to hire the best qualified person available irrespective of race. Thus, there was sufficient evidence to support the jury's finding of no liability and the judge's determination that no injunctive relief was warranted. This case is radically different from *Evergreen* both as to the issues for which review is sought and the underlying facts.

Petitioner asserts that injunctive relief is mandatory in cases of established discrimination. This Court has not held such relief to be mandatory, and, in any case, no discrimination has been established in the present case.

In *Teamsters*, where the Court actually found a pattern or practice of discrimination and held prospective relief to be justified, injunctive relief was not considered mandatory, but was cited as one of several alternatives. *Teamsters*, 431 U.S. at 361, 52 L.Ed.2d at 431. In the present case, there was no evidentiary basis for concluding that the Institute follows any pattern, practice or policy of preferring the employment of black faculty members over faculty members of other races. Discrimination was not established. The jury verdict established quite the contrary.

The Court of Appeals was quite correct then in relying on *Meyer v. Brown & Root Construction Co.*, 661 F.2d 369 (5th Cir. 1981) and *Gregory v. Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972) in holding that "in a suit brought in the plaintiff's individual capacity, injunctive relief benefitting nonparties is not required if it in no way relates to the vindication of the plaintiff's rights." *Dybczak*, 737 F.2d at 1527; Pet. A-11. If the facts in *Gregory* and *Meyer* did not warrant an injunctive remedy, then clearly none is warranted by the facts in this case. In *Gregory*, defendant's practice of requiring job applicants to reveal their arrest records was held to be racially discriminatory and plaintiff was awarded damages and attorney fees. In *Meyer*, defendant's action in reassigning plaintiff to a more strenuous position while she was pregnant was found to be disparate treatment based on sex and plaintiff was awarded damages and attorney fees. In neither case was injunctive relief found to be warranted.

In the case at bar the jury found that the petitioner had not been discriminated against. Obviously it cannot be said that broad injunctive relief, primarily benefitting non-parties, is necessary to give petitioner the relief to which he is entitled when it has been declared that he is not entitled to any relief at all.

Clearly the three federal courts of appeals that have ruled on this issue (Fifth, Ninth and Eleventh Circuits) are in agreement. Nor, in view of the unanimity of the decisions, can it be said to be an undecided question of federal law of such importance that it should be settled by this Court. Thus the grounds for granting a petition for a writ of certiorari are not present.

B. The Jury Was Correctly Charged Under the Standards Established by this Court in McDonnell Douglas and Burdine

Petitioner's objection to the jury instructions arises from his contention that the standard of proof applicable to this case is the one articulated in *Lee v. Russell County Board of Education*, 684 F.2d 769 (11th Cir. 1982) rather than the standard applicable to the typical Title VII proceedings as set forth by this Court

in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) and amplified in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981).

The *McDonnell Douglas* test was elaborated in *Burdine* as follows:

> First the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the employee's rejection . . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination . . . .
>
> The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff . . . . The McDonnell Douglas division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question. 450 U.S. at 252-53, 67 L.Ed.2d at 215.

The standard of proof set forth in *Lee* and urged by petitioner is applicable only under certain factual circumstances not present here. Under the *Lee* test where actual discrimination against plaintiff has been proved, the defendant has the burden of satisfying the jury that the contested employment decision would have been made even absent the discriminatory factor. The *Lee* test is applicable only when plaintiff has established by direct evidence that defendant acted against plaintiff with discriminatory motive. *Lee, supra* at 774.

Petitioner also relies upon this Court's decision in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977). That decision does not compel the mode of proof or jury instructions urged by petitioner. In that case conduct protected by the First Amendment was established to have

been a motivating factor in an adverse employment decision. The lower court had given defendant no opportunity to prove that the employment decision would have been made in any case. This Court held that even where the protected conduct had been a motivating factor, defendant should not be liable if it could show that the same decision would have been made in the absence of the protected conduct. 429 U.S. at 287, 50 L.Ed.2d at 483-84.

In the case at bar, petitioner did not prove that any discriminatory motive was a significant or substantial factor in the Institute's employment decisions concerning him. The only evidence petitioner urges in support of his contention that the *Lee* standard is applicable is that former President Foster was concerned starting in 1973 that petitioner was not as knowledgeable of the pools of qualified black teachers from which to recruit faculty as he might have been. This clearly does not rise to a showing of a discriminatory motive in hiring faculty.

The Court of Appeals' conclusion that that evidence was "not *directly* probative of the Institute's intent when dealing with [petitioner] in particular, "*Dybzcak*, 737 F.2d at 1528; Pet. A-16, was sufficient basis for holding that the "charge suggested by *Lee* would have been inappropriate." *Id.* There is no claim in the petition for writ of certiorari that the jury charge actually given did not conform to the *McDonnell Douglas—Burdine* standard. Nor does petitioner contend that the *McDonnell Douglas—Burdine* instruction itself requires review or modification by this Court. He contends that the evidence below justified the *Lee* instruction rather than the *McDonnell Douglas—Burdine* instruction.

The trial court found and the appeals court affirmed that there was no credible evidence that a discriminatory motive was a significant or substantial factor in the complained of employment decision concerning petitioner. Therefore, the *Lee* instruction was refused.

No new issue of law has been presented; no conflict among the federal courts of appeals is alleged. Petitioner merely disagrees

with the trial court's evaluation of the evidence, as affirmed by the appeals court. No basis whatsoever has been shown for further review by this Court.

CONCLUSION

The petition for writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in *Dybczak v. Tuskegee Institute* should be denied or an order summarily affirming that decision should be issued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief in Opposition to Petition for Writ of Certiorari was served on Petitioner by mailing three copies thereof to his attorneys Alvin T. Prestwood and Claude P. Rosser, Jr., Prestwood & Rosser, P.O. Box 217, Montgomery, Alabama 36101-0217, first class postage prepaid on January 4, 1985.

(signed) Marvin S. Cohen

MARVIN S. COHEN